DH Long Point Management LLC *and* UNITE HERE Local 11. Case 31–CA–226377

February 3, 2020

DECISION AND ORDER

BY CHAIRMAN RING AND MEMBERS KAPLAN AND EMANUEL

On June 21, 2019, Administrative Law Judge Jeffrey D. Wedekind issued the attached decision. The Respondent filed exceptions and a supporting brief, the General Counsel and the Charging Party filed answering briefs, and the Respondent filed a reply brief.

The National Labor Relations Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings,[1] and conclusions and to adopt the recommended Order as modified.[2]

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge as modified below and orders that the Respondent, DH Long Point Management, LLC, Rancho Palos Verdes, California, its officers, agents, successors, and assigns, shall take the action set forth in the Order as modified.

1. Substitute the following for paragraph 1(b).

"(b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act."

2. Substitute the following for paragraph 2(g).

"(g) Within 14 days after service by the Region, post at its facility in Rancho Palos Verdes, California copies of the attached notice, in English and Spanish, marked 'Appendix.'[3] Copies of the notice, on forms provided by the Regional Director for Region 31, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. In addition to physical posting of paper notices, the notices shall be distributed electronically, such as by email, posting on an intranet or an internet site, and/or other electronic means, if the Respondent customarily communicates with its employees by such means. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. If the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since June 2, 2018."

3. Substitute the attached notice for that of the administrative law judge.

Dated, Washington, D.C. February 3, 2020

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John F. Ring, Chairman

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Marvin E. Kaplan, Member

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William J. Emanuel, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

[1] The Respondent has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

In adopting the judge's finding that Freddy Lovato did not exercise independent judgment in directing employees and was not a supervisor within the meaning of Sec. 2(11) of the Act, we find it unnecessary to rely on the judge's citation to *Hobson Bearing International, Inc.*, 365 NLRB No. 73 (2017). In adopting the judge's finding that the Respondent knew about Lovato's union and other protected activities, we find it unnecessary to rely on the judge's statement that the Respondent's human-resources chief implicitly admitted that she knew about Lovato's May 2, 2018 union activities. Finally, in adopting the judge's finding of union animus, we find it unnecessary to rely on Resort President Terri Haack's correspondence with city officials or on the judge's statement that "[i]ndeed, as noted in [*NLRB v. RELCO Locomotives, Inc.*, 734 F.3d 764 (8th Cir. 2013)] and *Wright Line*, [251 NLRB 1083 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982),] the Board has consistently held that antiunion statements may be relied on as background evidence of animus even if they were not unlawful."

[2] We shall modify the judge's recommended Order to conform to the remedy section of his decision and to the Board's standard remedial language, and we shall substitute a new notice to conform to the Order as modified.

[3] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union

Choose representatives to bargain with us on your behalf

Act together with other employees for your benefit and protection

Choose not to engage in any of these protected activities.

WE WILL NOT discipline, discharge, or otherwise discriminate against you for engaging in union activities or other protected concerted activities.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights listed above.

WE WILL, within 14 days from the date of the Board's Order, offer Freddy Lovato full reinstatement to his former job or, if that job no longer exists, to a substantially equivalent position, without prejudice to his seniority or any other rights or privileges previously enjoyed.

WE WILL make Freddy Lovato whole for any loss of earnings and other benefits resulting from his discharge, less any net interim earnings, plus interest, and WE WILL also make him whole for reasonable search-for-work and interim employment expenses, plus interest.

WE WILL compensate Freddy Lovato for the adverse tax consequences, if any, of receiving a lump-sum backpay award, and WE WILL file with the Regional Director for Region 31, within 21 days of the date the amount of backpay is fixed, either by agreement or Board order, a report allocating the backpay award to the appropriate calendar years.

WE WILL, within 14 days from the date of the Board's Order, remove from our files any reference to the unlawful June 2, 2018 final written warning issued to Freddy Lovato and the August 13, 2018 termination of his employment, and WE WILL, within 3 days thereafter, notify him in writing that this has been done and that the final written warning and the termination will not be used against him in any way.

DH LONG POINT MANAGEMENT, LLC

The Board's decision can be found at www.nlrb.gov/case/31-CA-226377 or by using the QR code below. Alternatively, you can obtain a copy of the decision from the Executive Secretary, National Labor Relations Board, 1015 Half Street, S.E., Washington, D.C. 20570, or by calling (202) 273–1940.

Marissa Dagdagan, *Esq*., for the General Counsel.
Paul Rosenberg, Esq. and *Nancy Inesta, Esq. (Baker & Hostetler LLP)*, for the Respondent Company.
Jeremy Blasi, Esq. and *Charles Du, Esq.,* for the Charging Party Union.

DECISION

JEFFREY D. WEDEKIND, ADMINISTRATIVE LAW JUDGE. For approximately 9 years, Freddy Lovato worked in the kitchens at the Terranea Resort in Rancho Palos Verdes, California. He began in May 2009 as a cook II, was promoted to a cook I in March 2010, and was promoted again to the position of junior sous chef in July 2010. He continued in that position for the next 8 years without incident (aside from a verbal warning in 2012 for not taking a break on time).

However, in October 2017, Lovato began openly and actively supporting an employee campaign to obtain representation by UNITE HERE Local 11 and to improve working conditions at the resort. He was a member of the union organizing committee. He spoke to the press and was quoted by several news outlets in October and December 2017 (Bloomberg, Eater Los Angeles, LAist, and the Los Angeles Times) describing the "terrible" working conditions in "the back of the house" and the resort's alleged violations of wage and hour laws and exploitation of foreign interns. He also participated in several union and/or employee delegations, including two that attempted to meet with the resort's president in October 2017 and March 2018, and a third that submitted a petition to the City in early May 2018 in support of a local ballot initiative to require the resort and other large hospitality employers to pay a $15/hour minimum wage.

Several weeks later, on June 2, 2018, Lovato was issued a "final written warning"—his first discipline in 6 years—assertedly because he failed to ensure that the sauce on a guest's mac and cheese dish was gluten-free as ordered. And a few months later, on August 13, he was terminated, assertedly because he attempted to wash off and reuse a large batch of 50 fried chicken wings after the guests belatedly changed their order to a different sauce, and because he subsequently left the wings uncovered in the cooler and failed to throw them out as instructed by the chef de cuisine.

The General Counsel alleges that both the final written warning and the termination were unlawful; that the Respondent Company[1] disciplined and discharged Lovato for the asserted reasons because he was a prominent and outspoken supporter of the union campaign and improving employee working conditions at the resort, in violation of both Section 8(a)(1) and Section 8(a)(3) of the National Labor Relations Act.[2]

The Company denies the allegations. It contends that junior sous chef is a supervisory position and that Lovato was therefore not even an employee protected by the Act. Alternatively, it contends that Lovato's union or protected concerted activities had nothing to do with the final written warning and the termination; that Lovato was lawfully disciplined and discharged solely because of his poor work performance and insubordination as stated in the June and August 2018 disciplinary notices.

A hearing to address these allegations and defenses was held on April 2–5, 2019, in West Los Angeles. The General Counsel, the Union, and the Company thereafter filed briefs on May 23, 2019. As discussed below, the allegations are supported by a preponderance of the credible evidence.[3]

I. BACKGROUND

The Terranea Resort includes a 600-room hotel and numerous restaurants (Mar'sel, Nelson's, Bashi, Catalina Kitchen, Solviva, The Grill, and Cielo Point), each of which has its own menu, kitchen, and operating procedures. There is also a separate banquet kitchen, which prepares food for large events, and an adjacent "in-room dining" (IRD) kitchen that is open 24 hours a day and prepares food ordered off the room service menu. The IRD kitchen also prepares food for Sea Beans, a coffee bar at the resort, and the Lobby Bar & Lounge.

Bernard Ibarra, the executive chef and vice president of culinary experience, oversees all of the resort's kitchens. Each kitchen also has a chef de cuisine and sous chef, which all parties agree are likewise management positions. Below them in each kitchen, by order of rank, are a junior sous chef, cooks I, II, and III, cook-interns who recently completed culinary school, and helpers provided by a temp agency when needed. (Tr. 596–599, 608, 655–656, 669, 730, 734.)

Following his promotion to junior sous chef, Lovato initially worked at Nelson's and/or Catalina Kitchen. However, he transferred to the IRD kitchen in or about 2012, where he continued for the next 6 years until his August 2018 discharge. At the time of the alleged unlawful disciplinary actions, the sous chef in the IRD kitchen was Efren Ruano, and the chef de cuisine, the top manager in the kitchen, was Mona Guerrero. Guerrero had previously been promoted into the same position at Nelson's but transferred to the IRD kitchen at the end of 2017 or beginning of 2018. Also working in the IRD kitchen were 9 or 10 cooks, 5 or 6 cook-interns, and 2 helpers.[4]

Guerrero and/or Ruano set the weekly work schedule for Lovato and the other IRD kitchen workers, assigning each to one or more of the four daily shifts (breakfast, lunch, dinner, and overnight). Lovato was always scheduled to work the dinner shift (2–10:30 p.m). Guerrero and Ruano typically began work between 9 am and noon and worked at least 10 hours. One or both of them always worked on the same days as Lovato and were present during most of his shift.[5]

Guerrero and/or Ruano also assigned Lovato and the other IRD kitchen workers to a particular station in the kitchen based on an assessment of each person's skills and experience. Lovato and the cooks and cook-interns were assigned to one of the three sections on "the line": the hot side, the fryer, or the cold side. Lovato and the other more experienced cooks (I or II) were assigned to the hot side, which cooks the more expensive protein dishes. Less experienced cooks were assigned to the cold side, which cooks pizzas and makes salads, cold sandwiches, appetizers, and desserts. (Tr. 37–38, 49–50, 55, 152, 641, 741, 805.)

Lovato and the other cooks on the line received food orders on tickets that were typed into a computer by room service personnel and printed out on one of the kitchen's two printers. Depending on their station, they then cooked or prepared whatever hot and/or cold dishes were on the ticket. Whoever prepared the dishes then placed them in a window on a long counter that runs along the line for the servers to pick up and deliver to the rooms.

During a "rush" (a very busy period during a shift), Guerrero, Ruano, or a room service manager usually acted as an expediter or "expo" by standing on the other side of the window/ counter and making sure the dishes were prepared and organized correctly according to the ticket order and the resort's standards. However, during other periods or if none of these individuals were available, it was up to those working on the line and the servers to make sure the dishes were correct. (Tr. 36–41, 231, 671, 701–709, 803–804, 817–818.)

II. WHETHER LOVATO WAS A SUPERVISOR

Section 2(11) of the Act, 29 U.S.C. § 152, defines a supervisor as

> any individual having authority, in the interest of the employer, to hire, transfer, suspend, lay off, recall, promote, discharge,

[1] The Respondent, DH Long Point Management LLC, operates the resort.

[2] The initial and amended charges were filed on August 24 and October 4, and the complaint issued on December 28, 2018. The Board's jurisdiction is uncontested and established by the admitted factual allegations.

[3] Citations to the record are included to aid review and are not necessarily exclusive or exhaustive. In making credibility findings, all relevant factors have been considered, including the interests and demeanor of the witnesses; whether their testimony is corroborated or consistent with the documentary evidence and/or the established or admitted facts; inherent probabilities; and reasonable inferences that may be drawn from the record as a whole. See, e.g., *Daikichi Corp*., 335 NLRB 622, 623 (2001), enfd. 56 Fed. Appx. 516 (D.C. Cir. 2003); and *New Breed Leasing Corp. v. NLRB,* 111 F.3d 1460, 1465 (9th Cir.), cert. denied 522 U.S. 948 (1997).

[4] See GC Exhs 2, 9; R. Exh. 5; and Tr. 156–159. Executive Chef Ibarra usually began work at 6:30 am and stayed until about 9 pm. Although he had an office near the IRD kitchen, he only spent about 60 percent of his time in it, and as indicated above he also had to oversee all the other kitchens. (Tr. 612, 625, 660–661, 679.)

[5] See GC Exh. 9; R, Exhs. 3 ("Culinary Weekly Leadership" schedule), 5, 30; and Tr. 42, 60. Like Lovato, neither Guerrero nor Ruano typically worked during the overnight shift and early breakfast shift (10:30 p.m.–9 a.m.). Thus, the record indicates that no one in the IRD kitchen "leadership" was present in the kitchen to oversee the cooks and other employees during that time.

> assign, reward, or discipline other employees, or responsibly to direct them, or to adjust their grievances, or effectively to recommend such action, if in connection with the foregoing the exercise of such authority is not of a merely routine or clerical nature, but requires the use of independent judgment.

The burden is on the party asserting 2(11) supervisory status to establish by a preponderance of the evidence that the individual has the authority to perform or effectively recommend at least one of these listed actions. *NLRB v. Kentucky River Community Care, Inc.*, 532 U.S. 706, 710 (2001); and *Entergy Mississippi, Inc.*, 367 NLRB No. 109, slip op. at 2 (2019).

Here, there is no contention or evidence that the junior sous chefs in the IRD and other kitchens had the 2(11) authority to hire, transfer, suspend, lay off, recall, promote, discharge, assign,[6] reward,[7] discipline, or adjust grievances of cooks or other kitchen employees during the relevant period. Nor is there any contention or evidence that they had the 2(11) authority to effectively recommend such actions. Indeed, there is no evidence that they were even consulted or asked to provide an evaluation or other input with respect to any of these types of actions.

Rather, the Company's sole contention is that the IRD and other junior sous chefs had the 2(11) authority to responsibly direct cooks and other kitchen employees. In support, it cites a variety of documentary and testimonial evidence, including the junior sous chef position description, testimony by Ibarra, Guerrero, Lovato himself, and other junior sous chefs and cooks about the junior sous chef's authority, performance evaluations and assessments of junior sous chefs, and certain secondary or circumstantial indicia of supervisory status.

As discussed below, however, none of this evidence, either individually or in combination, satisfies the Company's burden of proof.

A. The Junior Sous Chef Position Description

The junior sous chef position description in effect during the relevant period stated, among other things, that junior sous chefs had "the opportunity" to "supervise [and] coordinate . . . activities of cooks and other kitchen personnel," and the "responsibilities" of "guiding and supporting the team"; that the "scope" of their position included "oversee[ing] Terranea Resort culinary operations" and "[being] responsible for leadership of direct reports and all of their employees"; and that the "activities" of their position included "provid[ing] essential hands on leadership to ensure functional food & beverage operations." (R. Exh. 7.)

However, the Board has consistently held that such "paper" authority is insufficient by itself to establish actual supervisory authority under Section 2(11). See *Chi Lakewood Health*, 365 NLRB No. 10, slip op. at 1 fn. 1 (2016), and cases cited there. See also *Beverly Enterprises-Massachusetts, Inc. v. NLRB,* 165 F.3d 960, 962–964 (D.C. Cir. 1999).

B. Testimony Regarding the Authority of Junior Sous Chefs

As discussed above, like the cooks, the junior sous chef was assigned to a station on the line in the IRD kitchen and cooked dishes throughout the scheduled shift. However, Ibarra testified that when both the chef de cuisine and the sous chef were not around—i.e., when they were off or were doing other tasks in the office such as making menu changes, ordering supplies, or performing administrative work—the junior sous chef became "the person in charge." This meant that, in addition to cooking, he was expected to "monitor" the line, make sure the cooks made the dishes correctly, and direct them to remake a dish if they failed to do so. (Tr. 605–607, 610.) Guerrero testified that when both she and Ruano were not around the junior sous chef could also move a cook to a different station "on the fly" if the kitchen was "going down" during a rush (Tr. 796–798, 820).

Lovato and other junior sous chefs gave similar testimony. Lovato confirmed that he was "in charge" when Guerrero and Ruano were not there, and that he had to "keep an eye on the line" and would correct mistakes if he caught them.[8] Francisco Santos, who worked as a junior sous chef in the banquet/main kitchen, testified that he was "the one to oversee . . . the operation" when the chef de cuisine and sous chef were not there (Tr. 456). And Pablo Noh, who worked as a junior sous chef at Nelson's until January 2019, testified that he was one of "the kind of managers" and the "third person in charge" after the chef de cuisine and sous chef (Tr. 367–368). See also the testimony of Jose Flamenco, who worked as a cook II in the IRD kitchen, Tr. 249 (chef de cuisine, sous chef, and junior sous chef are the three supervisors in the kitchen); and Gary Landsberg, who worked as

[6] The Company introduced a transcript of a September 15, 2016 deposition Lovato gave in an unrelated third-party lawsuit where he testified that he was an "entry level supervisor" who "help[ed]" his chef "supervise" the kitchen staff, and that he had the authority in 2014 to grant a cook's request to leave early (R. Exh. 4, pp. 7, 30–33). The Company also elicited testimony from Lovato on cross-examination that, during the relevant period here (from October 2017 until his August 2018 termination), cooks or other kitchen employees would sometimes ask him if they could leave early if business was slow and the chef de cuisine and sous chef were not around (Tr. 192–193). However, the Company's posthearing brief cites this as evidence of responsible direction rather than assignment of employees. In any event, Lovato did not testify that he still had the authority to grant such requests during the relevant period (Company counsel never asked him). Further, as discussed above, the record indicates that Guerrero and/or Ruano were always scheduled to work on the same days as Lovato, and were present during most of his dinner shift, including the rush period. The Company presented no evidence that Lovato's decision would have been more than "routine or clerical in nature" and required "independent judgment" within the meaning of Sec. 2(11) in these circumstances. Accordingly, the Company failed to establish that Lovato had supervisory authority on this basis. See *Hobson Bearing International*, 365 NLRB No. 73, slip op. at 22 (2017); and *Community Education Centers, Inc*., 360 NLRB 85, 94 (2014).

[7] Chef de Cuisine Guerrero testified that junior sous chefs could "verbally reward" employees (Tr. 816). However, the Company's posthearing brief does not rely on this testimony. In any event, the mere ability to orally praise or compliment an employee's work is insufficient to establish 2(11) supervisory authority. Indeed, even the authority to issue written evaluations is insufficient to establish 2(11) supervisory status absent evidence that the evaluations affect the wages or job status of the evaluated employees. See *Willamette Industries, Inc*., 336 NLRB 743 (2001); and *Harborside Healthcare, Inc*., 330 NLRB 1334 (2000), and cases cited there.

[8] Tr. 34, 153, 163–165, 175. See also Lovato's prior deposition testimony, discussed in fn. 9, above, R. Exh. 4, at pp. 12, 30 and 33 (it was his decision whether to allow a cook to leave early in 2014 because he was the cook's "supervisor")

a cook II at Mar'sel until March 2018 (Tr. 285–286, 333–334) (he reported to the junior sous chef "in some capacity," who would sometimes tell him what to do).[9]

There is insufficient evidence, however, that such direction required "independent judgment" within the meaning of Section 2(11). The Board has held that judgment is not independent within the meaning of that provision if it is "dictated or controlled by detailed instructions, whether set forth in company policies or rules [or] the verbal instructions of higher authority." *Oakwood Healthcare, Inc.,* 348 NLRB 686, 693 (2006). Consistent with Section 2(11), this interpretation distinguishes "true supervisors who exercise 'genuine management prerogatives' with 'straw bosses, leadmen, [and] set-up men,' who are still entitled to the Act's protections despite the exercise of 'minor supervisory duties[,]' *NLRB v. Bell Aerospace Co.*, 416 U.S. 267, 280–81 [ ] (1974)," and "faithfully implements the Supreme Court's guidance" in *NLRB v. Kentucky River Community Care*, 532 U.S. at 714, that "'detailed orders and regulations issued by the employer' might preclude a finding of independent judgment." *NLRB. v. Sub Acute Rehabilitation Center at Kearny, LLC,* 675 F. Appx. 173, 177 (3d Cir. 2017).

Executive Chef Ibarra testified that the IRD junior sous chef had no involvement in creating the room service menu, selecting the ingredients for each dish, establishing the steps for preparing each dish, or determining how the dish should taste or look on the plate. Ibarra testified that only he, the IRD chef de cuisine and sous chef did so; that they were "very precise" about it; and that the cooks, including the junior sous chef, were required to follow the "standard" or "template" they created.[10] Further, Guerrero testified that the junior sous chef would only move a cook to a different station in a crunch who was already known to have the experience to work at that station.

There is also insufficient evidence that the IRD junior sous chef "responsibly" directed other cooks in preparing dishes within the meaning of Section 2(11). Responsible direction means not only being able to take action to ensure tasks are performed correctly by an employee, but also being accountable for that performance, i.e., there is a prospect of material consequences to the alleged supervisor if the employees he/she directs do not perform their tasks correctly. *Oakwood Healthcare*, 348 NLRB at 691–692; and *Golden Crest Healthcare Center*, 348 NLRB 727, 731 and fn. 13 (2006). See also *UPS Ground Freight, Inc. v. NLRB*, 921 F.3d 251, 255 (D.C. Cir. 2019).

The Company attempted to establish that the IRD junior sous chef could be held accountable for the performance of other kitchen staff by introducing a "memo to file" regarding Lovato that Guerrero wrote in early July 2018 and emailed to Ibarra and Anita Kwok, the resort's chief of "people services" a/k/a human resources (HR). The memo stated:

> I am writing this not as a disciplinary notice, but to clarify some concerns that have recently been brought to my attention and to note the disciplinary actions that may transpire from these issues if the behavior continues.

The memo then summarized a conversation she had with Lovato on July 7 about the previous evening's service. The memo stated that she expressed "concern" with the "lack of leadership" and "initiative to guide the team" he displayed during the "much disorganized evening of service," and the "hope" that he "will be able to provide leadership, guidance, and supervision to our team" moving forward. (R. Exh. 21.)

However, the memo did not set forth any further details regarding the "disorganized evening of service." Neither did Guerrero in her hearing testimony, except that "it was kind of a cluster that night" and Lovato's station "crumbled" (Tr. 775).

Further, Executive Chef Ibarra, who supervised Guerrero, testified that he did not believe the evening service on July 7 warranted disciplining Lovato, and that he told Guerrero so. Ibarra testified that "we do a lot of lecturing and coaching," and that Guerrero's conversation with Lovato was just a coaching. (Tr. 645–646.)

Moreover, Guerrero acknowledged that, aside from the June 2018 final written warning to Lovato for failing to ensure that a mac and cheese order was gluten-free, she could not identify any example during her 5 years as a chef de cuisine where a junior sous chef in any of the resort's kitchens was disciplined for the poor performance of other kitchen staff. Neither could Ibarra, who had been the resort's executive chef for 6 years, nor Kwok, who had been the HR director or senior director since 2015.[11]

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[9] At the General Counsel's request, I permitted Landsberg to testify by videoconference from the Board's regional office in Philadelphia. Although the Company objected, I found that the General Counsel's motion set forth "good cause based on compelling circumstances" under Sec. 102.35(c) of the Board's Rules; specifically, that Landsberg currently lived and worked as a restaurant line cook in that city; that his corroborating testimony was necessary to prove the complaint allegations; that he might be unable to travel to Los Angeles for the hearing due to the additional time it would require him to be away from his job; that he would most likely be precluded from testifying if he was not permitted to do so by videoconference; and that videoconferencing was the only certain means of securing his testimony. I also found that the General Counsel's motion set forth "the conditions in place to protect the integrity of the testimony" and the "appropriate safeguards" that would be implemented as required by Sec. 102.3(c)(1) and (2). See my March 29, 2019 order.

[10] See also Guerrero's testimony, Tr. 815 (she would ask "everybody" in the kitchen for input on the menu, including but not limited to the junior sous chef, but she created the room service menu in collaboration with Ibarra and Ruano, and she and Ibarra made the final decision).

[11] See Tr. 692, 695–697 (Ibarra); 818 (Guerrero); and 842–843, 864, 871 (Kwok). The Company argues that a written warning Banquet Kitchen Junior Sous Chef Santos received in November 2018 for serving undercooked/raw chicken (GC Exh. 21, p. 12) is such an example. When questioned at the hearing, Santos testified that he had, in fact, been disciplined on that occasion for someone else's mistake (Tr. 475–476, 480). However, when asked to explain exactly what happened, Santos testified that he was the only person responsible for the event that day; that he personally heated up the chicken in the oven and plated it; and that he didn't check to make sure the chicken was fully cooked because he thought it had been fully cooked the day before per the usual practice (Tr. 476). Santos's description of the incident is consistent with the summary description in the written warning and was not controverted. Thus, when he testified that he had been disciplined for someone else's mistake on that occasion, he was obviously referring to the failure of someone to fully cook the chicken the day before, not the mistake of someone under his direction on the day the chicken was served.

As for Lovato's June 2018 final written warning, the testimony is conflicting about why it was issued. Although Guerrero and Ibarra testified that Lovato was disciplined for failing to ensure that the other hot-side cook (Jose Flamenco) made the gluten-free mac and cheese dish correctly, Kwok—who Ibarra consulted and who wrote the summary "description of situation" on the disciplinary notice—testified that she thought that both Flamenco and Lovato had made the mac and cheese dish incorrectly.[12] Thus, even assuming the June 2018 final written warning to Lovato was nondiscriminatory and lawful (which, as discussed below, is contrary to the weight of the evidence), it is not a clear example of a junior sous chef being disciplined solely for the poor performance of others.

Accordingly, the Company failed to establish by a preponderance of the evidence that there was a prospect of discipline to Lovato or other junior sous chefs for failing to ensure that other kitchen staff performed their tasks well or correctly. See *Entergy Mississippi*, 367 NLRB No. 109, slip op. at 2–3 ("Supervisory status is not proven where the record evidence 'is in conflict or otherwise inconclusive.'"), quoting *Phelps Community Medical Center*, 295 NLRB 486, 490 (1989).

C. Performance Evaluations and Assessments of Junior Sous Chefs

The record also includes a number of performance evaluations or assessments that management completed over the years for Lovato and Santos, who as indicated above worked as a junior sous chef in the banquet/main kitchen. Three of the Lovato evaluations or assessments commented that he needed to "take control of the kitchen more" (Nelson's-Catalina Kitchen July 2011); to "show more initiative in organization of kitchen" and "more leadership" (IRD Kitchen July 2015); and to "[m]ake sure WHOLE team is set for the shift" and "be more engaging and show your presence as a manager" (IRD Kitchen May 2018) (GC Exhs. 3, 5; R. Exh. 22).[13] Several of the Santos evaluations similarly commented that he needed to "work on being a leader and giving Associates directions" (July 2013); to exercise "more of a leadership role" (August 2014); to "understand[] his role as a supervisor," "grow and develop more as a supervisor," and "delegate simple task[s]" to . . . cook [III] and helpers" (July 2015); and to "guide our staff to success" and learn "to organize the staff and execute orders accordingly" (Dec. 2017). (R. Exhs. 8–11).

The Company contends that these negative comments likewise show that Lovato and the other junior sous chefs were accountable for the performance of the other kitchen staff. However, as indicated above, such negative comments are not alone sufficient to establish accountability; rather, the Company must show that Lovato or Santos suffered or might have suffered material adverse consequences as a result. See *Golden Crest Healthcare Center*, 348 NLRB at 731–732.

The Company argues that the potential for such adverse consequences is shown by the fact that Lovato was never promoted to a sous chef position. See Lovato's testimony, Tr. 47 (he applied for a sous chef position but was never called for an interview).[14] However, the Company never presented any direct evidence that this was or might have been due to Lovato's inadequate direction of the other kitchen staff. Nor does the record as a whole support an inference of such a cause and effect. As indicated above, only three of Lovato's junior sous chef evaluations or assessments between July 2010 and August 2018 included such negative comments, in 2011, 2015, and 2018. And the record does not reveal when or how many times Lovato applied for a sous chef position.[15]

Further, the standard evaluation form that the Company used for Lovato and the other junior sous chefs did not even include directing the kitchen staff as a performance factor. Rather, the above-quoted negative comments were variously included under such factors as "Knowledge of Job," "Working Relationships and Cooperation," and "Dependability."[16]

Moreover, similar negative comments were included in Lovato's previous evaluations in October 2009 and June 2010, when he was still a cook II or I. See GC Exhs. 6, 7 ("He needs to push the younger cooks around him to do more and take more initiatives," and "needs to improve his leadership"). Yet, he was promoted to junior sous chef anyway shortly thereafter.

Thus, as with the prospect of discipline, the Company failed to establish that there was a real—i.e., more than "merely speculative" (*Golden Crest*, 348 NLRB at 731)—prospect of being denied a promotion or suffering other material adverse consequences for failing to adequately direct the staff.

D. Secondary or Circumstantial Indicia of Supervisory Status

The Company does not dispute that Lovato and other junior sous chefs were required to clock in and were paid by the hour like other employees rather than a salary like the chef de cuisine and sous chef; that they received the same benefits as employees and were not eligible for bonuses like the chef de cuisine and sous chef; and that they did not attend management or supervisory meetings and were denied access to certain "salaried manager" only areas like the Culinary Room (Tr. 51, 56, 84, 687, 812; GC Exh. 8). However, it argues that certain other "secondary indicia" support a finding that Lovato and the other junior

[12] See Tr. 638–639, 723 (Ibarra), 757, 760 (Guerrero), and 868–869 (Kwok). The description Kwok wrote is set forth infra.

[13] Although the May 2018 assessment contained no title, Guerrero testified that it was a "PIP" (performance improvement plan). See Tr. 729–732, 735.

[14] As noted by the Company, the Board in *Golden Crest* indicated that material adverse consequences could include, not only being disciplined, but being denied a merit increase, bonus, or promotion. See 348 NLRB at 731 n. 13. It is unclear, however, whether the Board meant to include any type of promotion, i.e., not only a promotion that involves a change in title and increase in pay, but also a promotion that additionally involves a substantial change or increase in job duties and authority (such as a promotion from junior sous chef to sous chef). Nevertheless, as neither the General Counsel nor the Union argues for distinguishing between types of promotions, I have assumed for purposes of this decision that being denied either type may be evidence of accountability.

[15] The record indicates that the IRD sous chef position was vacant from about Labor Day (Sept. 5) 2016 to about Labor Day (Sept. 4) 2017. See Tr. 46, 228. Lovato's two evaluations prior to or during this period, in July 2015 and August 2017, rated him average, above average, or outstanding on all the listed performance factors and did not include negative comments of the type quoted above. See GC Exhs. 2, 3. (The record does not include a 2016 evaluation.)

[16] The above-quoted comments in Guerrero's May 2018 assessment or "PIP" were included under the headings "Projects" and "Opportunities."

sous chefs were supervisors. Specifically, it cites Ibarra's uncontroverted testimony that, like the chefs de cuisine and sous chefs, junior sous chefs were given an email address and wore black pants and a jacket with their name embroidered on it, rather than blue and white checkered pants and a plastic nametag like the cooks (Tr. 608, 655–656). It also cites the previously discussed testimony by

Lovato and other junior sous chefs and cooks regarding their perception of the junior sous chefs' supervisory status and/or authority.[17]

However, such secondary or circumstantial indicia cannot establish 2(11) supervisory status where there is insufficient evidence that the subject individual actually has the authority to perform or effectively recommend one or more of the specific actions listed in that section. See, e.g., *Sam's Club*, 349 NLRB 1007, 1014 (2007); *Webco Industries*, 334 NLRB 608, 610 (2001), enfd. 90 Fed. Appx. 276, 282 (10th Cir. 2003); and *NLRB v. Dole Fresh Vegetables, Inc.*, 334 F.3d 478 (6th Cir. 2003). As discussed above, the Company failed to establish that the IRD and other junior sous chefs have any such authority.

III. WHETHER LOVATO WAS UNLAWFULLY DISCIPLINED AND DISCHARGED

A. The June 2 Final Written Warning (The Gluten-Free Mac and Cheese Incident)

1. Factual background

Over the years, the IRD kitchen frequently received special orders from guests with gluten, dairy, nut, and other allergies or sensitivities. The kitchen accommodated such special orders by offering to prepare certain dishes without the offensive ingredient. For example, it offered a gluten-free pizza and a gluten-free mac and cheese. The former required substituting a frozen premade gluten-free pizza crust and using fresh sauce and cheese from a previously unopened container or bag to avoid cross-contamination. The latter required substituting both a gluten-free pasta and a gluten-free cheese sauce prepared à la minute (on the spot) with cheddar cheese and cream, as the regular sauce had a roux (mixture of butter or oil and flour) in it.[18]

There were occasionally incidents prior to 2018 where guests complained that a special order was not prepared allergen-free as requested. Following such incidents, or if a VIP with allergies was a guest, the IRD chef de cuisine at the time would remind the kitchen staff during the regular preshift lineups that they needed to be vigilant and take precautions to avoid cross-contamination, including using clean gloves, pans, utensils, and surfaces in preparing the special order. (Tr. 73–75.) There is no evidence that any kitchen staff were disciplined following those incidents, however.

A few allergy-related incidents also occurred in 2018 between January, when Guerrero transferred into the IRD kitchen, and August, when Lovato was terminated. The first occurred on May 19, about a week before the subject mac and cheese incident, and involved an order for a gluten-free pizza. The second was the gluten-free mac and cheese incident on May 25. The third occurred a month later on June 29 and involved a guest with a pineapple allergy who ordered a pineapple-free fruit dish.

a. The previous May 19 pizza incident

The previous incident involving the gluten-free pizza occurred late Saturday afternoon, between 4:45 and 5 pm. Both Guerrero and Ruano were working that day and Guerrero was moving around the kitchen at the time (R. Exh. 5; Tr. 806). Lovato was also working (R. Exh. 25).

At 4:52 pm a ticket came in for various items, including a gluten-free pepperoni pizza, sliders, a vegan burger, a house salad, and brownies.[19] Per the usual practice, the ticket emphasized the special pizza order by stating "Gluten Free" underneath it multiple times. It also added, "SEVERE WHEAT GLUTEN ALLERGY," indicating that the gluten allergy was particularly severe. (R. Exh. 26.)

A cook proceeded to make the pizza, and Guerrero, who was in the window, made sure it was set aside for the server to deliver to the guest. Unfortunately, however, later that evening the manager on duty received a report that the guest had suffered an allergic reaction and had been transported to the local hospital by paramedics. The child's father also complained to the front desk the following morning, stating that his son "could have died"; that his family was "traumatized"; and that he "highly doubted" that proper precautions were taken in preparing the meal.[20]

The incident was reported to Executive Chef Ibarra and others in the "Terranea Leadership Group" later that morning. Ibarra subsequently spoke to Guerrero and Ruano about it, and concluded that, at the very least, some cross-contamination had occurred in making the pizza.[21] However, he decided not to issue

[17] The Company's posthearing brief also cites evidence indicating that Lovato is often the only chef on duty during the last hour or two of his dinner shift. However, as previously noted (fn. 5), the record also indicates that there is typically no IRD kitchen chef whatsoever (chef de cuisine, sous chef, or junior sous chef) during the entire overnight shift and early breakfast shift.

[18] See R. Exh. 19 (IRD menu allergen chart that lists which items contain common allergens and whether the allergens could be omitted from the order); and Tr. 72–75, 82, 210, 212, 256, 610–616, 753. See also fn. 39, infra.

[19] The record is unclear whether pizza toppings such as pepperoni contained gluten. However, the IRD menu allergen chart discussed above (R. Exh. 19) specifically indicated that a "pepperoni pizza" could be prepared gluten-free.

[20] Jt. Exh. 5; GC Exh. 19. The record does not reveal whether the family subsequently sought compensation from the resort for medical expenses or other damages.

[21] To the extent Guerrero's and Ibarra's testimony is inconsistent with this finding, it is discredited. Guerrero testified that she was on the line when the ticket came in; that she witnessed the cook make the gluten-free pizza properly; and that the cook confirmed that he made it properly when she questioned him later (Tr. 752–753, 804). And Ibarra testified that he relied on Guerrero's account because it "was pretty factual" and "straight to the point" and he "had no reason to believe that what she told me was not the truth" (Tr. 699). But, when she was asked to identify who the cook was, Guerrero claimed that she could not remember, even after being shown the work schedule for that evening (R. Exh. 5). In fact, she testified that it could have been "anybody" on the line, even Lovato. (Tr. 805–806.) It is highly unlikely that Guerrero could have forgotten who the cook was under the circumstances. As discussed

any type of discipline to anyone. Instead, he directed Guerrero and Ruano to remind the kitchen staff about the standard operating procedures for allergen-free orders during the preshift lineups.[22]

b. The May 25 mac and cheese incident

As indicated above, the second incident involving the subject gluten-free mac and cheese order occurred just 6 days later, on Friday May 25. It was early in the evening, between 6:15 and 6:30 pm, and the IRD kitchen was very busy. Lovato was working the hot-side grill and oven as usual. Next to him, about 5–8 feet down the line working the stove and sauté station, was Jose Flamenco. Flamenco was an experienced cook II who had worked the hot-side with Lovato for several years, helped train the newer cooks, and prepared gluten-free orders every day. Unlike Lovato, however, he had not publicly supported the union and was not considered a union supporter by management.[23]

Both Chef de Cuisine Guerrero and Sous Chef Ruano were also working. However, neither was overseeing the line at the time. Guerrero was in the kitchen office working on menu changes for the Lobby Bar. And Ruano was in the back helping her with recipes for the new menu items. No room service manager was around to expedite either. (R. Exh. 5; Tr. 209, 232, 745).

At 6:22 pm, a ticket came in ordering numerous items, including a gluten free mac and cheese, two regular mac and cheeses, an avocado grilled cheese, a BLTA, a burger, and three orders of fries. Again, the ticket highlighted the special mac and cheese order by stating "Gluten Free" several times underneath it. It also stated "Allergy" several times to emphasize that the guest actually had an allergy to gluten. (R. Exh. 24; Tr. 747–748.)

It was Flamenco's job to make all three mac and cheese orders at the stove and sauté station, including the gluten-free one, and he did so. He then placed them in the window on the counter for the server to take along with the other items on the ticket. Lovato, who was busy at the grill and oven preparing other orders, did not work on or handle the gluten-free mac and cheese dish in any way. (Tr. 82– 83, 258, 264–266, 760.)

Sometime later, the front house manager received a call from the mother of the child who had ordered the gluten-free mac and cheese. She reported that her daughter began vomiting after eating it. The manager apologized and asked if her daughter needed medical assistance. She said no, was forgiving about the matter, and accepted the manager's offer to comp the room service bill. (Jt. Exh. 3.)

The manager notified Guerrero of the call shortly after, and Guerrero went to the line to look at the ticket and speak with Lovato and Flamenco about it. Her conversation with them was very short, about 30–45 seconds, and she asked only two questions. Her first question was whether Flamenco had used the gluten-free pasta, which was a different shape than the regular kind. Flamenco said he had and showed her the separate pot and water he had used to boil it. Guerrero then asked what else could have been the cause of the daughter's reaction. Lovato replied,

above, it was an unforgettable incident; a child was transported by paramedics to the hospital and reportedly almost died. Further, Guerrero claimed to have personally watched the cook make the pizza, and to have questioned him about it after learning of the child's hospitalization. Indeed, she claimed to remember very specific details about what she observed. See Tr. 752–753 ("I saw [the pizza] being prepared . . . off to the side on another table"; "I remember seeing a bag of cheese" and a new container of pizza sauce; and "when it came up to the window, we set it aside [where] the server's going to pick it up.") Moreover, it is also highly unlikely that the pizza was made by Lovato. As discussed above, pizzas were made on the cold side and there is no evidence that Lovato even knew that the incident occurred at the time. (Lovato himself testified that he only later heard about the incident from room service managers, and he did not know what day it occurred or that he was working that day. See Tr. 79–80, 203–204.) Finally, it is also highly unlikely under the circumstances that Guerrero would not remember that Lovato made the pizza if, in fact, he had done so. In sum, Guerrero's testimony was wholly unbelievable. And given the obvious relevance of the incident to determining whether Lovato was disparately treated for the subsequent mac and cheese incident, it is reasonable to infer that her testimony was intended, not only to prevent the General Counsel and the Union from identifying and questioning the cook who made the pizza, but to falsely suggest that Lovato himself might have made it.

There are also good reasons to disbelieve Ibarra's testimony about what Guerrero said had happened and/or whether he believed her. For example, although Ibarra testified that he had no reason to doubt what Guerrero told him, there were clearly grounds to do so, including not only the guest's report and apparently strong belief about what had happened, but also the fact that Guerrero, as the manager overseeing the kitchen at the time, obviously had a personal and professional interest in absolving the kitchen of culpability. Moreover, at another point in his testimony Ibarra seemed to falsely cast blame on the guest. See Tr. 621 (testifying that the guest had not been "firm" in "stating that [the pizza] had to be totally segregated when the food was delivered"). As indicated above, the ticket shows that the guest had, in fact, notified room service that the child had a "SEVERE WHEAT GLUTEN ALLERGY."

Accordingly, the opposite of Guerrero's and Ibarra's testimony is inferred: that no discipline was issued despite their belief that the kitchen had failed to take sufficient precautions to avoid cross-contamination or to otherwise ensure that the pizza was made gluten-free. See *Ozark Automotive Distributors, Inc. v. NLRB*, 779 F.3d 576, 585 (D.C. Cir. 2015); and *NLRB v. Howell Chevrolet*, 204 F.2d 79, 86 (9th Cir.) affd. 346 U.S. 482 (1953) (where witnesses are discredited, the trier of fact may find, not only that their testimony was untrue, but that the truth is the opposite of their testimony).

[22] Ibarra's testimony about management's subsequent measures to make sure the staff were reminded of the standard procedures for allergen-free orders was elicited by the Company itself on direct examination. It has not been not relied on by the General Counsel or the Union in their posthearing briefs, or here, as additional evidence that the kitchen had failed to follow the standard procedures in making the gluten-free pizza. See FRE 407, Subsequent Remedial Measures.

[23] See R. Exhs. 5, 24; and Tr. 81, 157, 166, 207–208, 247–252, 255–256, 259, 266–267, 806, 853–858. Contrary to Lovato and Flamenco, Guerrero testified that it was "later in the evening" and was not particularly busy at the time because the dinner rush typically occurs "kind of early" (Tr. 821). However, her testimony was not corroborated by Ruano, whom the Company did not call to testify, the room service manager, who was also not called to testify, or any other manager. Moreover, it was inconsistent with the documentary evidence. The ticket for the mac and cheese order (R. Exh. 24), which Guerrero testified she inspected after the incident (Tr. 746), shows that it came in at 6:22 pm. Thus, this appears to be another example where Guerrero gave false testimony; this time both to explain why she and Ruano were not in the window and to suggest that any error that occurred in making the gluten-free mac and cheese dish was more egregious because the kitchen was not particularly busy at the time. See also fn. 21, above.

"Oh, the cheese sauce, it has a roux in it." And Flamenco did not follow up or say anything indicating that he had substituted a gluten-free sauce. Guerrero therefore concluded that Flamenco must have forgotten to do so, and she ended the conversation and returned to her office.[24]

Shortly thereafter, beginning around 9 pm, Guerrero sent a series of emails to Executive Chef Ibarra describing the incident. She told him about the child's order for a gluten-free mac and cheese; that Lovato and Flamenco were on the line at the time; and that "the cheese sauce which has a roux, was given to the server which the server took to the guest." She told him that neither she nor Ruano were in the window at the time and that she had let Ruano know that one of them needed to be there in the future "especially for all the tickets with allergies." She said she had "reminded [Lovato] that he also needs to be watching out for these mistakes." (Jt. Exh. 3; Tr. 746, 750.)

Ibarra was upset when he read Guerrero's emails, and asked if she and Ruano had talked about "allergies/sop" during the IRD kitchen preshift lineup. Guerrero replied that they had. Ibarra also subsequently reviewed the house manager's May 25 notes about the mother's report and discussed the matter further with both Guerrero and HR Chief Kwok. All three agreed that both Flamenco and Lovato should be disciplined for the incident. Specifically, Ibarra and Guerrero agreed that Flamenco should be disciplined for failing to make the gluten-free mac and cheese dish gluten-free; and that Lovato should be disciplined for failing to ensure that Flamenco made the dish gluten-free. As for Kwok, as previously discussed, she incorrectly thought that both Lovato and Flamenco had made the mac and cheese dish. (Jt. Exh. 3; Tr. 635, 638–639, 664, 703, 757–760, 773, 844, 868–871.)

On May 29, Ibarra forwarded to Kwok both the manager's report and Guerrero's emails to assist in drafting the disciplinary notices. Kwok emailed Ibarra and Guerrero a draft written warning for Lovato later that day, stating that they could use the same draft for Flamenco by swapping his name. Kwok also stated that, while the draft for Lovato was prepared as a written warning, she would leave it up to them to decide whether to raise it to a final written warning. (Jt. Exh. 3; R. Exh. 20; Tr. 635.)

Ibarra and Guerrero did, in fact, decide to change the draft to a final written warning for Lovato. They presented the completed "Progressive Disciplinary Notice" to him a few days later, on June 2, in Ibarra's office. Except for substituting "final written warning," the completed notice was identical to that drafted by Kwok. Under "Description of Situation," the notice stated:

> On Friday, May 25th, the Resort received a complaint in which a child of a guest had been violently ill. The guest had ordered mac n cheese which was to be gluten-free due to her Celiac disease. It was discovered that the pasta used was gluten-free but the cheese sauce was not. The child had an allergic reaction and began to vomit. As a chef, it is your responsibility to know all the ingredients used in a dish and to ensure allergy requests such as gluten-free, nut-allergy, dairy-allergy, are adhered to. This situation caused a child to become ill, jeopardized her health, and the outcome could have been far worse. Based on the severity of your actions, this documentation serves as a final written warning. Any future infractions may result in further disciplinary action up to and including termination.

In addition, under "Solution–Desired Behavior/Performance," the notice stated, "When you are unsure of the dish and its interaction with an allergy, you can always go to another Chef to get guidance." Finally, the notice indicated that Lovato had not received any prior discipline for the same offense.

Lovato told Ibarra and Guerrero that he disagreed with the disciplinary notice. He explained that he was busy that evening, there was a rush, and none of the managers were around to check the food on the line. He also wrote the following on the notice under "Associate Comments:"

> That night there was like 3 to 4 manager[s] on charge on my department, I'm at the bottom of level—no any higher manager check[ed] this dish or communicate[d] any extra warning about this special order.

However, Guerrero told Lovato that he was responsible because he was the junior sous chef and working that day. And Lovato ultimately signed the notice. (Jt. Exh. 1; Tr. 78–79, 640, 759, 771–772.)

The same day, Ibarra and Guerrero also gave Flamenco a progressive disciplinary notice. However, it was only a written warning rather than a final written warning. Other than substituting "Cook II" for "chef," the notice was otherwise essentially the same as the one given to Lovato. It contained the same "Description of Situation" and "Solution—Desired Behavior/ Performance," and likewise indicated that Flamenco had no prior discipline for the same offense.

Like Lovato, Flamenco signed the disciplinary notice. However, unlike Lovato, he did not protest, offer an explanation, or write anything under "Associate Comments."[25]

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[24] See Guerrero's testimony, Tr. 744–745, 749–750, 808. There are some reasons to doubt Guerrero's account. For example, it suggests that, despite being the IRD chef de cuisine, she did not know or recall that the regular cheese sauce contained a roux until Lovato mentioned it. See also fns. 21 and 23, above. However, Flamenco and Lovato failed to demonstrate a good or consistent recollection of the short conversation or offer an alternative version of what was said. Flamenco recalled that Guerrero had called both him and Lovato to the office that evening and told them that the child got sick, but he could not remember whether he told Guerrero his version of what happened or exactly what else was said (Tr. 257–258, 265). Lovato, on the other hand, testified that he did not recall Guerrero even talking to him about the incident that evening (Tr. 208, 239). Further, there is nothing else in the record that might explain how Guerrero came to the conclusion that the order was made with gluten-free pasta but not gluten-free sauce. Accordingly, Guerrero's testimony in this respect has been credited.

[25] See Jt. Exh. 4; and Tr. 642–643 (Ibarra), 773 (Guerrero). Flamenco testified that he actually made the entire mac and cheese dish gluten-free, including the cheese sauce using cream and cheese; that he placed it in the window on the counter separate from the other mac and cheese dishes; and that the server must have taken the wrong order (Tr. 256–259, 268–271). He also testified that he tried to tell Guerrero this when he was given the written warning but she was very upset and didn't want to hear about it (Tr. 258). However, there are several problems with this testimony. First, there is no corroborating evidence that Flamenco prepared and substituted the gluten-free cheese sauce on the dish. Lovato testified that he recalled seeing Flamenco making the pasta but not the cheese sauce (Tr. 208). Second, as previously discussed, Flamenco

c. The subsequent June 29 pineapple incident

The third incident involving the pineapple allergy occurred about a month later, on June 29. It was a Friday afternoon. All three IRD chefs, Guerrero, Ruano, and Lovato were working that day. However, Guerrero testified that she was not overseeing the line or expediting at the time, and the record does not reveal where Ruano and Lovato were or what they were doing.[26]

At about 4 p.m. a ticket came into the kitchen that included an order for a fruit dish without pineapple. The ticket clearly stated that pineapple had to be omitted because the guest had an "allergy" to it.

A Cook III-intern, Colin Lindayao, was working the cold side at the time and it was his job to make the fruit dish. He did so, and a server delivered it to the room. Shortly after, Guerrero received a report that the dish was not made without pineapple as requested. Fortunately, however, the guest noticed that the dish contained pineapple and did not ingest it. Guerrero subsequently spoke to Lindayao and he admitted that he saw that the guest was allergic to pineapple but forgot to omit it when he made the dish.

Lindayao was issued a verbal warning, the lowest level of discipline, later the same day. Under "Description of Situation," the disciplinary notice stated:

> Colin was working in the pantry of In Room Dining kitchen at approximately 4 pm when a ticket was produced for a guest with an allergy to pineapple. The ticket clearly stated allergy, Colin claimed he saw the allergy and that he forgot when he served the fruit with the pineapple. The fruit went out to the room and the guest actually caught the fruit before it was ingested.

Under "Solution–Desired Behavior/Performance," the notice stated, "Colin needs to be focused and aware of all and any food being prepared and leaving his station at all times." The notice did not indicate whether he had been previously disciplined for the same offense.

Lindayao signed the notice and did not write anything on it under "Associate Comments."[27]

2. Legal analysis

The parties agree that the proper analytical framework for determining whether the June 2, 2018 final written warning to Lovato was unlawful is set forth in *Wright Line*, 251 NLRB 1083, 1089 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982). Under that framework, the General Counsel must prove by a preponderance of the direct and/or circumstantial evidence that an employee's union or protected activity was a substantial or motivating factor for the adverse employment action. The General Counsel can make a sufficient initial showing in this regard by demonstrating that the employee engaged in union or protected activity and the employer knew or suspected it, and that the employer had animus against the union or protected activity. If the General Counsel makes the required initial showing, the burden shifts to the employer to establish by a preponderance of the evidence that it would have taken the same adverse action against the employee even absent his/her union or protected activity. See *Shamrock Foods Co.,* 366 NLRB No. 117, slip op. at 26–27 (2018); *East End Bus Lines, Inc.,* 366 NLRB No. 180, slip op. at 1 fn. 7 (2018); and *American Red Cross Missouri-Illinois Blood Services Region*, 347 NLRB 347, 349 (2006), and cases cited there.

a. Lovato's union and protected activities

It is undisputed that Lovato participated in the following union and other activities to improve working conditions at the resort prior to the June 2 final written warning.

Union organizing committee. Lovato began attending union meetings in the summer of 2017 and became a member of the union organizing committee (Tr. 57, 69 331, 392).

Public announcement of union campaign. The union organizing campaign was publicly announced at the resort on October 19, 2017. Approximately 200 employees, union organizers, and union members from other hotels gathered in one of the resort's public parking lots and marched, passed out union flyers, and chanted union slogans. Lovato joined the marchers and also later attended a press conference in one of the parking lots. (CP Exhs. 5, 10; Tr. 58, 145–146, 200, 321–322, 339–340.)

First delegation to meet with the resort's president. On the same day, about 35 of the participants, including Lovato, formed a delegation to try and meet with the resort's president, Terri Haack, and request that management stay neutral during the union campaign. They did not get beyond the reception area outside Haack's office or get to see her. However, before leaving the building Lovato and several other employees spoke about why they were supporting the campaign. (Tr. 58–63, 323–324, 345, 394–395, 499–500, 526–527.)

Press interviews and news articles. Lovato was one of only a few employees who talked to the press about the union campaign and working conditions at the resort. And he was the only employee still working at the resort in May 2018 who was quoted in multiple news articles. Three of the articles were published on October 19, 2017, by Bloomberg, Eater Los Angeles, and LAist. A fourth article was published on December 27, 2017 by the Los Angeles Times. (GC Exhs. 11–14; Tr. 69, 502, 520–525.)

The Bloomberg Business article was titled, "Who's the Boss? Union Organizers Target Private Equity Owners," and included a large picture of the resort. It described the employees' plans to

didn't tell Guerrero that he prepared and substituted a gluten-free cheese sauce on the dish when she asked him and Lovato about the order that same evening. Rather, when Lovato mentioned that the regular cheese sauce had gluten in it, Flamenco remained silent. Third, as indicated above, Flamenco also didn't write any alternative version or explanation on the disciplinary form under "Associate Comments." Accordingly, Flamenco's foregoing testimony has not been credited.

[26] R. Exh. 30; Tr. 793. As previously noted, the Company did not call Ruano to testify. Lovato was never asked at the hearing if he was aware of the pineapple incident or where he was at the time.

[27] R. Exh. 29; Tr. 791–792. The record does not reveal whether Lindayao was a union supporter or whether the Company knew or suspected he was. The record is also unclear regarding who, other than Guerrero, was involved in the decision to issue him a verbal warning. Company counsel, who introduced the evidence, never questioned Ibarra and Kwok about the incident. As for Guerrero, she admitted that she didn't email Ibarra about the incident but testified that she "believe[d]" she had spoken with him about it (Tr. 825–826). She also twice testified that "we" decided to issue the verbal warning, but she did not identify who "we" referred to (Tr. 792).

unionize and to file a class-action lawsuit against the resort alleging, among other things, that they were unlawfully denied rest breaks and pay for overtime and the extra hour it took to ride a company shuttle between the resort and the distant employee parking lot. The article also discussed the Union's plans to oppose a tax-assessment appeal by the resort and to bring the employees' grievances to the attention of the private equity firm associated with the resort's operating company. It included comments from the Union's co-president and from a management-side attorney/former NLRB Board member. It also included a prepared statement issued by the resort stating that it strictly adhered to and abided by all labor laws. Finally, it closed with the following comments by Lovato, the only employee identified by name and quoted in the article:

> "Everything looks so beautiful in front of the house, but if you go in back of the house, where we are, it's terrible," said Terranea cook Freddy Lovato, who's worked at the resort for nine years. With customers living it up while employees toil, he said, "I always picture the 'Titanic' movie." [GC Exh. 11.]

The Eater Los Angeles article was titled "Terranea Workers Allege Wage Theft Violations in Class Action Lawsuit," and also included a picture of the resort. It reported that the employees had filed a class action lawsuit against the resort alleging various wage theft violations, including denial of meal and rest breaks and failure to pay for full hours worked. It included comments by Lovato and another employee, Galen Landsberg, who was a cook II in the resort's Mar'sel restaurant at the time but subsequently left in March 2018, before the alleged unlawful events here. The article quoted Lovato first, in the second paragraph of the article, stating:

> According to Terranea employee Freddy Lovato, the kitchen is "incredibly busy and we are regularly not permitted to take breaks."

Like the Bloomberg story, the article also included a prepared statement from the resort stating that it strictly adhered to and abided by all labor laws. (GC Exh. 12.)

The LAist article was titled, "Workers At Luxury Rancho Palos Verdes Resort Sue Over Alleged Wage Theft Violations," and also included a large picture of the resort. Like the Eater Los Angeles story, the article reported on the class action lawsuit filed on behalf of resort employees and included comments by Lovato and Landsberg. The article reported Lovato's comments first, in the third and fourth paragraphs of the article:

> "I am proud of the work my coworkers and I do to provide excellent service for our guests and to make this resort successful," Freddy Lovato, a cook who works in a kitchen preparing food for room service, the lobby bar, and Terranea's Sea Beans cafe, said in a statement. "But behind the scenes there are problems with the way we workers are being treated. And that is why I am speaking out."
>
> Lovato alleges that the resort denies him and other workers the 10-minute rest breaks they are legally allowed, saying, "I know the law says that we are supposed to be able to take two ten-minute rest breaks when we work an eight-hour shift. But that is not the reality. The company also does not provide workers like me with the pay it is supposed to provide when we can't take these breaks."

Like the other stories, the article also included a statement from the resort that it adhered to and abided by all labor laws. (GC Exh. 13.)

The subsequent December 27 LA Times article was titled, "Complaint accuses luxury Terranea Resort of human trafficking violations, exploiting foreign interns." It reported that the Union had filed a complaint the previous week with the U.S. State Department on behalf of two former cook-interns from India alleging that the resort's use of foreign interns violated the J-1 cultural and educational exchange visa program and human trafficking and labor laws. The article included comments by the former interns and the Union's attorney. It also included the following comments by Lovato, the only current employee identified and quoted in the article:

> Lead cook Freddy Lovato, 45, said he noticed when interns began filling full-time entry-level cook positions. Now, he estimates that interns fill at least 60% of those positions overall.
>
> Lovato works in the room service kitchen, where he met [the two foreign interns]. He has 20 years cooking experience and has been with Terranea since it opened in 2009.
>
> He said the interns' lack of experience and training can make his job more difficult, especially because they leave just as they're getting better. "We train them fast because we also have our own duties," he said.

Finally, the article also included a statement from the resort's spokeswoman that the allegations were "baseless." (GC Exh. 14.)

Delegation to the HR Office. On November 28, 2017, Lovato participated in a delegation of about 5–10 employees on the union organizing committee that went to the HR office during a break to ask for their personnel files. The receptionist told them they had to each fill out and sign a "Request to Inspect Personnel Records" form. Lovado did so and then returned to work. (GC Exh. 10; Tr. 64–66, 397.)

Second delegation to meet with the resort's president. On March 17, 2018, Lovato participated in a delegation of a few employees on the union organizing committee that went to the HR office to schedule an appointment to meet with President Haack. They wanted to speak to Haack because they had heard she was meeting with the CEO of another hotel where there was likewise a union campaign underway. Kei Eusebio, a senior HR manager, informed them that Haack was not available. A few days later, on March 20, Eusebio approached Lovato in the kitchen and asked if the group would meet with Haack that evening. However, the other members of the delegation were not present, so the meeting did not occur. (GC Exh. 18; Tr. 66–68, 398.).

Delegation to City Hall. On May 2, 2018, a union delegation went to the Rancho Palos Verdes city hall to deliver several thousand signatures that had been collected on a petition. The petition called for a local ballot initiative to enact an ordinance requiring large hospitality employers in the city such as Terranea to pay employees a $15/hour minimum wage and to provide panic buttons for those working in housekeeping or other isolated areas. Although the delegation included a number of union

organizers and activists, Lovato was the only Terranea employee in the group. Unlike other union supporters, he was off work that day. (GC Exh. 15; Tr. 68–70, 513–515.)

The General Counsel's complaint alleges that all of Lovato's foregoing activities between mid-October 2017 and early May 2018 constituted protected concerted activities under the Act. And Board precedent supports the allegations. See *North West Rural Electric Cooperative,* 366 NLRB No. 132, slip op. at 1 n. 1, and 12–15 (2018); *Allstate Insurance Co.,* 332 NLRB 759 n.3, 767 (2000); *Alaska Pulp Corp.,* 296 NLRB 1260 (1989), enfd. 944 F.2d 909 (9th Cir. 1991); and *Roure Bertrand Dupont, Inc.,* 271 NLRB 443, 444, 448–449 (1984), and cases cited there. Further, the Company's posthearing brief does not argue otherwise, i.e., it does not contend that any of Lovato's foregoing activities were not concerted or protected under the Act or that Lovato said or did anything in particular during those activities that exceeded the bounds of protected conduct.[28]

b. The Company's knowledge or suspicion of Lovato's union and protected activities

Chef de Cuisine Guerrero and HR Chief Kwok admitted that they knew Lovato supported the Union prior to issuing him the final written warning. Both testified that they either saw him or were aware that he was with the other union supporters on October 19, 2017.[29] Kwok also testified that she read the December 2017 LA Times article quoting Lovato regarding the resort's use of foreign interns, and that the other three October 2017 articles quoting Lovato were likewise circulated to the Leadership Group, including President Haack and Executive Chef Ibarra, and discussed at their weekly senior management meetings (Tr. 876, 879–881). In addition, as the head of HR, Kwok likely would have been aware of Lovato's documented visits to the HR office with other union supporters in November 2017 and March 2018 to obtain the personnel files of the union organizing committee members and to schedule a meeting with Haack.[30] And Kwok did not specifically deny that she was aware that Lovato went to City Hall with the Union on May 2, 2018 to deliver the petition for the ballot initiative. See Tr. 852 ("Q [by company counsel]. "[W]ere you aware that Mr. Lovato went to City Hall? He spoke about a ballot ordinance." A. I don't believe I was aware of him speaking.").[31] See also GC Exh. 15 (series of emails between city officials and Haack in February, March, April, and early May 2018 indicating that the city officials and others were keeping Haack informed about the Union's petition drive and that Haack was also informed when the petition was delivered to City Hall on May 2).[32]

As for Executive Chef Ibarra, he was initially evasive and inconsistent when asked whether he knew Lovato participated in the October 2017 demonstration and supported the union. See Tr. 643 ("Q [by company counsel]. [A]t the time of [the mac and cheese incident], did you know that Mr. Lovato was a supporter of the Union? A. You know no. And I knew he had sympathetic views. I don't talk to anybody about that. That never came to me. I don't know who's pro except for Mr. Santos.[33] That's the only one I knew." . . . Q. Okay. Did you ever see whether [Lovato] participated in any of the demonstrations the Union conducted? A. I re – I might have, yeah. I might have, yeah. Yeah. Yeah.").[34] However, like Kwok, Ibarra admitted on cross-examination that the October and December 2017 news articles quoting Lovato were emailed to him and others in the Leadership Group. He also admitted that he read at least some of the articles, including those about the class-action wage and hour lawsuit and the J-1 cook-interns. Finally, he also admitted that the union campaign and related activities were discussed among the Leadership Group at weekly senior management meetings. (Tr. 673–678, 721).

The foregoing direct and circumstantial evidence is sufficient to establish that the Company—including specifically Haack (the highest-ranking onsite manager) and Kwok, Ibarra, and Guerrero (the three managers admittedly involved in disciplining Lovato)[35]—knew or suspected that Lovato engaged in the union and other protected concerted activities described above and was one of the most active union supporters.

c. The Company's animus against the union and protected activities

Within a few weeks after the union organizing campaign was announced, the Company began holding a series of mandatory antiunion meetings with employees in each kitchen or department. Senior company managers, including President Haack, expressed strong opposition to the union at the meetings. (Tr. 310, 328–329, 430.) Indeed, Haack told the banquet kitchen employees at one such meeting in March or April 2018 that the Union

[28] In its answer to the complaint, the Company stated that it "lack[ed] sufficient information to admit or deny the allegations," which operated as a denial under Sec. 102.20 of the Board's Rules. However, the Company certainly had sufficient information by the end of the hearing to dispute the allegations, yet as indicated above it did not do so in its posthearing brief.

[29] Tr. 786, 814, 820, 851–852. Indeed, Kwok demonstrated an impressive knowledge and memory of who participated in the October 19 demonstration and/or supported the Union. See Tr. 853–858 (identifying by name 15 such individuals who were still employed at the resort).

[30] After Kwok admitted that she was aware that Lovato participated in the October 19, 2017 march, company counsel vaguely asked if she was also aware whether Lovato had participated in "other delegations" (Tr. 852). Kwok testified she was not. However, counsel did not specifically ask Kwok if she was aware of Lovato's visits to the HR office in November 2017 and March 2018. And as discussed, infra, Kwok subsequently admitted, at least implicitly, that she was aware that Lovato went to City Hall with the Union in early May 2018 to deliver the petition for the ballot initiative.

[31] Kwok's belief was correct; Lovato was present but did not speak when the petition was delivered to City Hall (Tr. 69–70).

[32] The Company did not call Haack to testify.

[33] As previously discussed, Francisco Santos was a junior sous chef in the banquet kitchen. Like Lovato, he was one of the most active union supporters (Tr. 525).

[34] Both Lovato and former Cook II Landsberg credibly testified that they saw Ibarra outside watching the marchers. Lovato also credibly testified that he saw someone he identified as a manager taking photos or filming the smaller delegation when it was inside the office reception area, and that he later saw the manager apparently showing the photos or video to Ibarra outside. (Tr. 61–63, 137, 324.)

[35] There is no apparent dispute, and the record as a whole establishes, that all four are supervisors and/or agents of the Company as defined in Sec. 2(11) and (13) of the Act.

would get in "over my dead body."[36] The Board has held that such a statement by a high-level manager constitutes an unlawful threat of futility in violation of Section 8(a)(1) of the Act and demonstrates an employer's union animus. See *Montgomery Ward & Co.,* 316 NLRB 1248, 1249, 1255 (1995), enfd. per curiam 97 F.3d 1148 (4th Cir. 1996); and *South Nassau Communities Hospital,* 262 NLRB 1166, 1175 (1982).[37]

Haack also expressed strong opposition to the Union's ballot initiative for a $15 minimum wage and panic buttons. She even contacted the mayor and other city officials in April 2018 and asked if they could stop the Union and its supporters from soliciting city residents to sign the petition at a local public event (Whale of the Day Festival) that was being held about a mile from the resort. (The city officials responded that they were unable to do so.) See GC Exh. 15. Cf. *Chelsea Homes*, 298 NLRB 813 n. 2 (1990); and *Gainesville Mfg. Co.,* 271 NLRB 1186, 1188 (1984) (an employer violates Section 8(a)(1) of the Act by calling the police to prevent union supporters from engaging in handbilling on public property). Thus, the evidence establishes that the Company likewise had animus against that activity. Cf. *Pacific Beach Hotel.,* 361 NLRB 709, 746, 752 (2014) (employer's animus was demonstrated by its numerous unfair labor practices, including attempting to prevent a union organizer from handbilling on a public sidewalk).

Although there is no evidence that Haack was directly involved in issuing the June 2, 2018 final written warning to Lovato, this makes no difference. As indicated above, both Ibarra and Kwok admitted that the union campaign was discussed at weekly senior management meetings. Ibarra also admitted that Haack repeatedly expressed her unhappiness about and opposition to the union campaign at the meetings (Tr. 676–678, 721). Further, as indicated above, Haack was the highest onsite manager of the resort and clearly spoke and acted on behalf the Company. See *Parsippany Hotel Management Co. v. NLRB*, 99 F.3d 413, 423–424 (D.C. Cir. 1996). It may reasonably and appropriately be inferred that other managers such as Ibarra, Kwok, and Chef de Cuisine Guerrero acted consistent with the Company's position or view. See *NLRB v. RELCO Locomotives, Inc.*, 734 F.3d 764, 782 (6th Cir. 2013) (CEO's open hostility towards unions could reasonably be imputed to other senior managers); and *Spurlino Materials, LLC v. NLRB*, 645 F.3d 870, 878 n. 7 (7th Cir. 2011) (rejecting employer's argument that General Counsel failed to prove an 8(a)(3) discriminatory dispatching violation because the evidence only established that the general manager had animus and not the dispatchers).

d. Circumstantial evidence of the Company's animus and discriminatory motive

There is also abundant circumstantial evidence of the Company's animus and discriminatory motive.

Cursory investigation. An employer's cursory investigation or failure to seek an explanation from an employee before issuing discipline may support an inference of animus and discriminatory motive. See, e.g., *Shamrock Foods*, 366 NLRB No. 117, slip op. at 28 (2018); and *Golden State Foods Corp*., 340 NLRB 382, 385 (2003). See also *CC1 Ltd. Partnership v. NLRB*, 898 F.3d 26, 33 (D.C. Cir. 2018). Here, as discussed above, Guerrero's investigation lasted only about 30–45 seconds and consisted of looking at the room service ticket and asking Flamenco and Lovato only two questions: 1) whether Flamenco had used gluten-free pasta, and 2) what else could have caused the guest's reaction. And while their responses indicated to Guerrero that Flamenco had failed to substitute a gluten-free sauce, she never inquired or investigated how busy Lovato was at the time or

[36] See Santos's testimony, Tr. 429–431. With respect to the timing of the meeting, see also Santos's testimony regarding his prior March 2018 trip to Pennsylvania with a union delegation to meet with the resort's investors (Tr. 400). Although Santos's testimony regarding Haack's statement was not corroborated by other banquet kitchen employees (none were called to testify by the General Counsel or the Union), it was credible on its face and was not controverted by Haack (who as noted above was not called to testify by the Company) or any other company witness. Nor does the Company's posthearing brief argue that it should be discredited or discounted. While the brief argues that Santos was a biased witness (citing his admission that the Union paid for his flight and hotel when he joined the union delegation to Pennsylvania), it does so only with respect to his testimony about poor safety and health practices in the banquet kitchen. See Br. at 38 n. 19. Further, it repeatedly cites and relies on Santos's testimony as support for the Company's positions on other significant matters. See Br. at 8, 20–26.

[37] Haack's March/April 2018 statement is not alleged as an unfair labor practice in the Union's charges or the General Counsel's complaint. However, this did not preclude the Union from presenting testimony about Haack's unlawful statement as additional evidence of the Company's antiunion animus and discriminatory motive for disciplining and discharging Lovato. See, e.g., *NLRB v. RELCO Locomotives, Inc*., 734 F.3d 764 (8th Cir. 2013); and *NLRB v. Wright Line*, 662 F.2d 899, 907 n. 14 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982). See also *CSC Holding, LLC*, 365 NLRB No. 68, slip op. at 4 (2017); and *Wilmington Fabricators*, 332 NLRB 57 n. 6 (2000). Indeed, as noted in *RELCO* and *Wright Line*, the Board has consistently held that antiunion statements may be relied on as background evidence of animus even if they were not unlawful. Further, the Company was given adequate notice that the Union would be presenting such evidence. Union counsel said so in his opening statement (Tr. 20–22). And there was further discussion about the matter in response to company counsel's evidentiary objection early on the second day of hearing, followed by a ruling that such evidence was clearly relevant and admissible (Tr. 311–319).

The Union also introduced documentary evidence of unalleged statements Haack made in posted letters to employees in 2018 and 2019 regarding the Union's campaign for a consumer boycott of the resort. CP Exhs. 7–9. See also, with respect to the boycott campaign, a March 23, 2018 company "union activity" report, CP Exh. 10 (three demonstrators, including one employee, handed out flyers to incoming vehicles and chanted "No respect, No peace. Don't check in. Check out. Shame on you, for staying here, shame on you"); and Tr. 347, 580. It also presented uncontroverted evidence of unalleged antiunion conduct by other resort managers and security guards (e.g., surveilling employees engaged in prounion activity, telling employees not to talk about the union at work, and prohibiting off-duty employees from handbilling around the resort), at least some of which was included in prior union charges and settled pursuant to a nonadmission informal settlement agreement (CP Exh. 10; Tr. 310–311, 321–326). See *St. Mary's Nursing Home*, 342 NLRB 979, 979–980 (2004), affd. 240 Fed. Appx. 8 (6th Cir. 2007), and cases cited there (presettlement conduct may be used to show animus and a discriminatory motive in a subsequent case, regardless of whether the settlement reserved the right to do so). However, it is unnecessary to address this additional evidence given the other direct and circumstantial evidence of the Company's animus and discriminatory motive discussed above.

whether there were any other circumstances that would explain why he did not see or ask whether Flamenco substituted a gluten-free sauce. Nor did Ibarra. It was not until after they issued the final written warning to Lovato that he was given an opportunity to explain, and his explanation (that it was busy that evening, there was a rush, and none of the kitchen or room service managers were around to help check the food on the line) was summarily rejected.

Failure to apply progressive discipline. An employer's failure to apply its progressive disciplinary system may also support an inference of animus and discriminatory motive. See, e.g., *Aliante Casino & Hotel*, 364 NLRB No. 78, slip op. at 1, 13 (2016); and *E.R. Carpenter Co., Inc.*, 306 NLRB 878, 881 (1992). See also *Fort Dearborn Co. v. NLRB*, 827 F.3d 1067, 1075–1076 (D.C. Cir. 2016). Here, as indicated above, the Company had a multi-step progressive disciplinary system, including, in order of severity, verbal warning, written warning, final written warning, and termination.[38] Yet, the Company immediately issued Lovato a final written warning, bypassing the two previous steps, even though he had no prior discipline on his record at the time. The only time he had been disciplined was a verbal warning he received 6 years earlier, in 2012, for failing to take a break on time, and that discipline was expunged from his record 6 months later (Tr. 30).

When asked by company counsel why Lovato was immediately issued a final written warning, Ibarra testified it was because "we almost killed somebody," and that he wanted to send "a strong enough message to make Lovato realize that we almost killed someone" (Tr. 638, 665). Guerrero similarly emphasized the severity of the incident, stating:

> It was something so—such a careless mistake, and the severity of it was—it was intense. I mean, a child got sick and it was for something that—I mean, it was just—it's just so easy. It's right there. You make the cheese sauce and you know what's in there, and then you sold it. You knew—I mean, he knew that he was selling something that was gluten-free; he made a separate pasta for it, but yet then put the cheese—like, it was just indescribable. Just felt very careless.

(Tr. 759). However, it was the prior pizza incident, not the mac and cheese incident, where the guest reportedly almost died. Further, it was not Lovato who made "such a careless mistake" in preparing the mac and cheese dish, but Flamenco. And Guerrero knew it, both because it was Flamenco's job to do so where he was stationed and because Flamenco told her he did so when she asked him that evening.[39]

As for HR Chief Kwok, she testified generally that there are times when the Company will bypass the progressive disciplinary system (Tr. 837). However, she did not provide any concrete or comparable examples. Nor were any such examples otherwise offered into evidence. Although the Company introduced 10 final written warnings issued to other resort employees in 2016, 2017, and 2018 (R. Exh. 37; Tr. 829), none of them involved cooks or other kitchen workers. Further, one of the notices indicated that the employee had received prior discipline for the same offense, another did not indicate one way or the other, and none of them indicated whether, like Lovato, the employees had no prior discipline on their record for any offense.

Disparate treatment. An employer's disparate treatment of union supporters may likewise support an inference of animus and discriminatory motive. See *Shamrock Foods Co.*, 366 NLRB No. 107, slip op. at 1 n. 1 (2018); and *Cayuga Medical Center at Ithaca, Inc.,* 367 NLRB No. 21, slip op. at 32–35 (2018), and cases cited there. See also *Fort Dearborn*, 827 F.3d at 1075–1076. Here, as discussed above, Lovato was issued more severe discipline than Flamenco, who was not a union supporter, even though Ibarra and Guerrero knew that Flamenco was the one who made the mac and cheese dish.

Ibarra and Guerrero testified that they decided to issue Lovato more severe discipline because he was a junior sous chef whereas Flamenco was a cook II, and he was responsible for making sure the cooks performed their job properly (Tr. 638–692, 773). However, as discussed above, Flamenco was an experienced cook II who had worked with Lovato on the hot side for years, helped train the newer cooks, and made gluten-free dishes every day. And the Company had never before disciplined a junior sous chef for failing to ensure that the cooks or other kitchen employees performed their work properly.

Further, the record indicates that no one, neither cook nor chef, was disciplined following the pizza incident just a week earlier, even though the guest was transported to the hospital and reportedly almost died, and even though, as found above, Ibarra believed the IRD kitchen had failed to follow the proper procedures to avoid cross-contamination.[40]

Finally, while an IRD cook was disciplined several weeks later for failing to make a fruit dish pineapple-free as ordered by

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[38] See, e.g., Jt. Exh. 1; R. Exh. 31, p. 31; and Tr. 837. Suspension is also a listed option on the progressive disciplinary form.

[39] See also Tr. 760 (admitting she believed it was Flamenco who made the mac and cheese); and R. Br. 35 n. 18 ("Ibarra and Guerrero made the final decision and knew very well that Flamenco likely cooked the dish."). Moreover, as noted above, Guerrero herself apparently did not know or recall at the time that the cheese sauce had gluten in it. Incredibly, she also testified that the IRD kitchen did not even offer or make a gluten-free cheese sauce; that the cooks had to use olive oil or butter on the gluten-free pasta instead (Tr. 825). However, both Lovato and Flamenco testified otherwise. And Ibarra, who was exempt from the sequestration order and heard their testimony, did not contradict it when he was subsequently called by the Company to testify. See Tr. 722–723. Further, the IRD menu allergen chart, which room service used when taking orders, indicated that dairy could not be omitted from the mac and cheese dish. Thus, Guerrero's testimony that olive oil could be substituted for cheese on a mac and cheese was also contrary to the documentary evidence. Finally, a "mac and cheese" without cheese would be no mac and cheese at all.

[40] Disciplining a cook or a manager following the pizza incident would not necessarily have increased the Company's risk of legal liability to the guest. Any such discipline likely would have been excluded from evidence in the legal proceeding, and thus could not have been used against the Company, on the ground that it constituted a subsequent remedial measure under Cal. Evid. Code § 1151, the equivalent of FRE 407. See *Fox v. Kramer*, 22 Cal.4th 531, 545, 93 Cal.Rptr.2d 497, 994 P.2d 343 (2000). See also *IVC US, Inc. v. Kinden Bulk Transportation SW, LLC*, 2017 WL 5203055, at *9 (N.D. Ga. April 4, 2017); *Al-Turki v. Robinson*, 2015 WL 6464411, at *12 (D. Colo. Oct. 27, 2015); and *Mahnke v. Washington Metropolitan Area Transit Authority*, 821 F.Supp.2d 125, 151–152 (D.D.C. 2011), and cases cited there.

a guest with a pineapple allergy, he was only issued a verbal warning. Guerrero testified that the lowest level of discipline was issued because he was just a cook III-intern, and "it's our job to guide and lead and teach" (Tr. 792). However, the incident plainly had nothing to do with a lack of guidance or training. Guerrero testified that, like other cooks, the cook III-interns had recently been instructed during preshift lineups regarding the standard operating procedures for preparing allergen-free orders (Tr. 826). And the cook III-intern who made the dish admitted to Guerrero that he simply forgot to omit the pineapple.[41]

False or misleading testimony. False or misleading testimony regarding the relevant facts and circumstances may also support an inference of animus and discriminatory motive. See *Shamrock Foods,* 366 NLRB No. 117, slip op. at 27–28 (2018); and *Airgas USA, LLC*, 366 NLRB No. 104, slip op. at 3 (2018), enfd. 916 F.3d 555 (6th Cir. 2019), and cases cited there. Here, as discussed above, Ibarra was both evasive and inconsistent when asked if he knew Lovato was a union supporter. Further, both he and Guerrero exaggerated the seriousness of the mac and cheese incident and Lovato's role in it when asked why they had issued him the final written warning. See also fns. 21 (discrediting Guerrero's and Ibarra's testimony about the comparable pizza incident) and 23 (discrediting Guerrero's testimony about when the mac and cheese incident occurred and how busy the kitchen was at the time).

In sum, the General Counsel and the Union presented a strong prima facie case that the Company harbored animus against the union and protected concerted activities and seized upon the mac and cheese incident as a pretext to issue a final written warning to Lovato and thereby create the foundation to rid itself of one of the Union's most active and outspoken supporters.

e. The Company's defenses

The Company argues that the foregoing evidence fails to prove the alleged violation primarily for three reasons: 1) because Lovato was not given the final written warning for the mac and cheese incident until over 7 months after he revealed that he was a union supporter at the October 19, 2017 demonstration; 2) because two other known union supporters who likewise participated in the demonstration (Santos and Marta Castro) were given a more favorable performance evaluation just 2 weeks later and they and many others remain employed at the resort;[42] and 3) because Ibarra and Guerrero had an honest belief that Lovato was responsible for failing to ensure that Flamenco made the mac and cheese gluten-free.

The Company's first argument might have some force if Lovato had not engaged in any further open union or other protected concerted activities after October 19, 2017. See, e.g., *Consolidated Biscuit Co.*, 346 NLRB 1175, 1180 (2006) (timing of employee's termination, 5 months after he last engaged in protected activity, did not support an inference of unlawful motive). However, as discussed above, the record shows that Lovato continued to openly engage in a variety of union and protected activities up until shortly before the final written warning, and that the Company knew or suspected that he engaged in those activities and harbored strong animus toward such activities. Further, there is substantial other circumstantial evidence of the Company's discriminatory motive.[43]

The Company's second argument also fails. The Board has repeatedly held that an otherwise well-supported showing of discriminatory motivation is not disproved by the fact that the employer did not take similar actions against all known union supporters. See *Fresh & Green's of Washington, D.C., LLC*, 361 NLRB No. 35, slip op. at 1 n. 1 (2014); *Volair Contractors, Inc.,* 341 NLRB 673, 676 n. 17 (2004); and *George A. Tomasso Construction Corp.,* 316 NLRB 738, 742 (1995), and cases cited there.

The Company's third "honest belief" argument likewise provides no defense under the circumstances. See *Fort Dearborn,* 827 F.3d at 1076 ("A good-faith belief . . . is of little aid to an employer where the discipline imposed by the company departs from its policy or practice."). See also *Aston Waikiki Beach Hotel*, 367 NLRB No. 27, slip op. at 8 (2018), and cases cited there (where the General Counsel establishes that the employer's cited reason for the adverse action was pretextual, the employer by definition cannot meet its burden of showing that it would have taken the same action even absent the employee's union or protected activity).

Accordingly, a preponderance of the credible evidence establishes that the June 2 final written warning violated both Section 8(a)(1) and Section 8(a)(3) of the Act as alleged.

B. The August 13 Termination
(The Chicken Wings Incident)

1. Factual background

The subsequent chicken wings incident occurred about 2 months later, on August 8. It was a Wednesday, early in the evening, and the kitchen was again very busy. Lovato was working the hot side as usual. Guerrero was expediting at the window.

At about 5:30 pm, Lovato was tossing a large batch of about 50 fried chicken wings in buffalo sauce for an order from the Lobby Bar when Guerrero informed him that the guests had changed their mind and wanted barbeque sauce. So he started washing the buffalo sauce off with water. It was common for cooks to wash off other proteins when the wrong sauce had been used and Guerrero had a general practice of trying to save proteins as they were relatively costly and she and other chefs de cuisine received bonuses for keeping costs down. Further, he didn't think the guests would notice since the sauces contained

[41] As previously discussed, unlike with the pizza and mac and cheese incidents, the guest caught the cook's mistake and did not ingest the pineapple. And HR Chief Kwok testified that she would consider whether anyone was injured in evaluating the level of discipline (Tr. 836–837). However, unlike with the mac and cheese incident, there is no evidence that Guerrero consulted Kwok with respect to the pineapple incident. See also Tr. 833, 839 (not all disciplinary matters go through HR; managers have the ability to issue discipline without consulting HR).

[42] See R. Exhs. 11, 40; and Tr. 466, 853–858, 861–862.

[43] The Company's posthearing brief also argues (p. 31) that the fact Lovato was not disciplined for the prior pizza incident shows that it was not trying to punish Lovato for his union or other protected activities. However, this argument merely perpetuates the fiction created by Guerrero's false hearing testimony that Lovato might have made the pizza. See fn. 21, supra.

similar ingredients. His plan was therefore to wash the buffalo sauce off, warm the wings back up in the fryer, and then toss them in the barbeque sauce.

However, when Guerrero saw what Lovato was doing, she told him to "get rid of" them and use fresh wings instead. She felt it was inappropriate to rinse and reuse the wings because they had breading on them that would absorb the water. Lovato therefore warmed up a fresh batch of 50 wings in the fryer (the wings were already fully cooked). However, he did not throw out the rinsed wings. He frequently provided leftover food to the overnight cook to use in making meals for the employees on the overnight shift, and he decided to do the same with the wings. So he put them in a large bowl and placed them on a shelf in the walk-in cooler. He left the bowl uncovered because he couldn't find the plastic wrap and the wings were still a little warm. He planned to cover it later when he had a free moment.

However, about 30 minutes later, Guerrero went into the cooler and noticed the uncovered bowl of wings. She touched them and realized that they were the same rinsed wings that she had told Lovato to get rid of. She took a picture of the wings to document it. She then went out and asked Lovato if they were the same wings. Lovato admitted that they were. Guerrero therefore immediately threw them in the trash. (R. Exh. 28; Tr. 88–94, 113–114, 219–221, 241, 301–304, 405–407, 473, 685–687, 715, 779–780, 811–812.)

The following afternoon, August 9, Guerrero sent an email to Ibarra describing what had occurred, both that Lovato had tried to rinse and reuse the wings and that he had subsequently put them in the cooler rather than get rid of them as she had instructed. Guerrero told Ibarra that the water "would have soaked into the breading and the wings and probably would have diluted the flavor of the chicken." She also said the amount of moisture in the wings could have made it "dangerous" to put them back in the fryer. But she said she was "more bothered that [Lovato] would alter the integrity of the product to save them from being thrown away." (R. Exh. 27.)

Ibarra and Guerrero subsequently discussed the matter with HR Chief Kwok, and all three agreed that Lovato should be terminated given his prior final written warning for the mac and cheese incident. Kwok therefore drafted a termination notice. The notice stated that Lovato had compromised the integrity of the food by trying to reuse the wings; that he had also violated health code standards by both trying to reuse the wings and placing them uncovered in the walk-in cooler; that he could have also jeopardized the safety of himself and his colleagues by refrying the rinsed wings ("refrying the wings could have caused [a] potential oil explosion"); and that he had also been insubordinate in violation of the employee rules of conduct by putting the rinsed wings in the cooler rather than getting rid of them as requested. The notice also referenced the prior final written warning that he had been issued for the mac and cheese incident and indicated that he had previously been disciplined for the same offense.[44]

Ibarra and Guerrero presented the termination notice to Lovato on August 13. Guerrero asked Lovato if he remembered the chicken wings incident and told him he was being terminated for it. Lovato, however, was taken by surprise as the incident had occurred 5 days earlier and no one had ever talked to him about it. He therefore refused to sign the notice, stating that he believed management was targeting him because of his union activity. (Tr. 84–85, 236, 652, 725.)

2. Legal Analysis

As discussed above, the General Counsel and the Union presented a strong prima facie case that the Company knew or suspected that Lovato was one of the most active and outspoken union supporters, that it had animus against the union and protected concerted activity, and that it was motivated by that animus when it issued the June 2 final written warning to Lovato for the mac and cheese incident. The same evidence and circumstances establish a strong prima facie case with respect to Lovato's August 13 termination following the chicken wings incident. Further, the Company's failure again to interview Lovato about the incident or offer him an opportunity to explain his actions provides additional circumstantial evidence of its discriminatory motive for the termination.[45]

Moreover, Ibarra and Guerrero both acknowledged that the chicken wings incident would not have warranted termination but for the prior final written warning for the mac and cheese incident (Tr. 651, 784). Accordingly, as the final written warning was unlawful, so necessarily was the termination. See *Care Manor of Farmington, Inc.,* 318 NLRB 725, 726 (1995); and *Dynamics Corp.*, 296 NLRB 1252, 1254 (1989), enfd. 928 F.2d 609 (2d Cir. 1991). See also *RELCO Locomotives*, 734 F.3d at 787 ("An adverse employment decision is unlawful if it relies upon and results from a previous unlawful action.").

Accordingly, a preponderance of the evidence establishes that the August 13 termination violated both Section 8(a)(1) and Section 8(a)(3) of the Act as alleged.

CONCLUSIONS OF LAW

1. The Company engaged in unfair labor practices in violation of both Section 8(a)(1) and Section 8(a)(3) of the Act by issuing Lovato a final written warning on June 2, 2018 because he engaged in union and other protected concerted activities and to discourage employees from engaging in such activities.

2. The Company likewise engaged in unfair labor practices in violation of both Section 8(a)(1) and Section 8(a)(3) of the Act by terminating Lovato on August 13, 2018 because he engaged in union and other protected concerted activities and to discourage employees from engaging in such activities.

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[44] Jt. Exh. 2; Tr. 651, 784, 850–851. Kwok testified that Lovato's prior discipline for the mac and cheese incident was the same offense because it likewise involved a "food handling violation." Tr. 850.

[45] The General Counsel and the Union also presented evidence that it was common to temporarily leave food uncovered in the cooler during busy periods and that management failed to remedy health and safety issues or problems when they were reported by kitchen staff. See Tr. 96–112, 226–227, 242–243, 412–429, 467–472; and CP Exh. 1–3, 6. Although the evidence was credible, it is unnecessary to address whether it also shows disparate treatment of Lovato given the other substantial evidence of the Company's unlawful motivation discussed above and the Company's admitted reliance on the prior unlawful final written warning as support for the termination.

3. The Company's unfair labor practices affect commerce within the meaning of Section 2(6) and (7) of the Act.

REMEDY

The appropriate remedy for the violations found is an order requiring the Company to cease and desist from its unlawful conduct and to take certain affirmative action. Specifically, the Company must offer Lovato full reinstatement to his former job or, if that job no longer exists, to a substantially equivalent position, without prejudice to his seniority or any other rights or privileges previously enjoyed. The Company must also make Lovato whole for any loss of earnings and other benefits suffered as a result of the unlawful termination of his employment on August 13, 2018. Backpay shall be computed in accordance with *F. W. Woolworth Co.*, 90 NLRB 289 (1950), with interest compounded daily as prescribed in *New Horizons*, 283 NLRB 1173 (1987), and *Kentucky River Medical Center*, 356 NLRB 6 (2010).

In addition, the Company must compensate Lovato for any adverse tax consequences of receiving a lump-sum backpay award, and file with the Regional Director a report allocating the backpay award to the appropriate calendar years. See *AdvoServ of New Jersey, Inc*., 363 NLRB No. 143 (2016).

The Company must also compensate Lovato for his search-for-work and interim employment expenses, regardless of whether those expenses exceed interim earnings. See *King Soopers*, *Inc*., 364 NLRB No. 93 (2016). The search-for-work and interim employment expenses shall be calculated separately from taxable net backpay, with interest compounded daily as prescribed in *New Horizons*, supra, and *Kentucky River Medical Center*, supra.

Further, the Company must remove from its files any references to the unlawful June 2, 2018 final written warning and August 13, 2018 termination, and notify Lovato in writing that this has been done and that those actions will not be used against him in any way.

Finally, as the record indicates that Spanish is the primary language of some of the Company's employees,[46] the Company must post a notice to employees in both English and Spanish notifying them of their rights under the Act and the Board's decision and order.

ORDER[47]

The Respondent, DH Long Point Management LLC, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Disciplining or discharging employees because of their union or other protected concerted activities.

(b) In any like or related manner restraining or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Within 14 days from the date of the Board's order, offer Freddy Lovato full reinstatement to his former job or, if that job no longer exists, to a substantially equivalent position, without prejudice to his seniority or any other rights or privileges previously enjoyed.

(b) Make Lovato whole for any loss of earnings and benefits suffered as a result of the August 13, 2018 discriminatory termination of his employment, in the manner set forth in the remedy section above.

(c) Make Lovato whole for his reasonable search-for-work and interim employment expenses, in the manner set forth in the remedy section above.

(d) Compensate Lovato for the adverse tax consequences, if any, of receiving a lump-sum backpay award, and file with the Regional Director for Region 31, within 21 days of the date the amount of backpay is fixed, either by agreement or Board order, a report allocating the backpay award to the appropriate calendar year.

(e) Preserve and, within 14 days of a request, or such additional time as the Regional Director may allow for good cause shown, provide at a reasonable place designated by the Board or its agents, all payroll records, social security payment records, timecards, personnel records and reports, and all other records, including an electronic copy of such records if stored in electronic form, necessary to analyze the amount of backpay due under the terms of the Board's order.

(f) Within 14 days of the date of the Board's order, remove from its files any reference to the unlawful June 2, 2018 final written warning issued to Lovato and the August 13, 2018 termination of his employment, and within 3 days thereafter, notify him in writing that this has been done and that those actions will not be used against him in any way.

(g) Within 14 days after service by the Region, post at its facility in Rancho Palos Verdes, California copies of the attached notice marked "Appendix."[48] Copies of the notice, on forms provided by the Regional Director for Region 31, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. In addition to physical posting of paper notices, the notices shall be distributed electronically, such as by email, posting on an intranet or an internet site, and/or other electronic means, if the Respondent customarily communicates with its employees by such means. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since June 2, 2018.

[46] Flamenco testified through a Spanish-language interpreter.

[47] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules, the findings, conclusions, and recommended Order will be adopted by the Board and all objections to them will be deemed waived for all purposes as provided by Sec. 102.48 of the Board's Rules.

[48] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

(h) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union

Choose representatives to bargain with us on your behalf

Act together with other employees for your benefit and protection

Choose not to engage in any of these protected activities.

WE WILL NOT discipline, discharge, or otherwise discriminate against you because you support UNITE HERE Local 11 or any other union or engage in other protected concerted activities for your mutual aid and protection.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights listed above.

WE WILL, within 14 days from the date of the Board's order, offer Freddy Lovato full reinstatement to his former job or, if that job no longer exists, to a substantially equivalent position, without prejudice to his seniority or any other rights or privileges previously enjoyed.

WE WILL make Lovato whole for any loss of earnings and benefits suffered as a result of our unlawful termination of his employment on August 13, 2018.

WE WILL also make Lovato whole for his reasonable search-for-work and interim employment expenses.

WE WILL also compensate Lovato for the adverse tax consequences, if any, of receiving a lump-sum backpay award, and file with the Board's Regional Director a report allocating the backpay award to the appropriate calendar year.

WE WILL also remove from our files any reference to the unlawful June 2, 2018 final written warning issued to Lovato and the August 13, 2018 termination of his employment, and notify him in writing that this has been done and that those actions will not be used against him in any way.

DH LONG POINT MANAGEMENT, LLC

The Administrative Law Judge's decision can be found at www.nlrb.gov/case/31-CA-226377 or by using the QR code below. Alternatively, you can obtain a copy of the decision from the Executive Secretary, National Labor Relations Board, 1015 Half Street, S.E., Washington, D.C. 20570, or by calling (202) 273–1940.